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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MANVILLE FOREST PRODUCTS CORPORATION,
Petitioner,

versus

MELVIN EVANS, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

1. Petitioner failed to attack the constitutionality of the Louisiana Statute upon which this action was brought in the lower courts and therefore this Honorable Court should not consider that issue.

Respondents brought their suit under the provisions of *Louisiana Revised Statute* 23:631 and 640 which grants a cause of action for collection of vacation pay under collective bargaining agreements. Although Petitioner argued that federal law applied, Petitioner failed to file any specific pleading attacking the unconstitutionality of this Louisiana Statute in the lower courts, which is a requirement for jurisdiction in this Honorable Court. It is also a requirement of Louisiana law that such constitutional issue be raised in the lower court. In order for this Honorable Court to grant any relief to Petitioner, it would have to declare *Louisiana Revised Statute* 23:631 and 640 unconstitutional as violative of the Supremacy Clause of the United States Constitution. Since such issue was not raised at the lower court level, and not passed upon by the lower courts, this Honorable Court should not consider that position.

2. The decision of the Louisiana Court in this matter does not conflict with the constitutional principle of federal pre-emption of labor disputes.

A line of federal cases holds that the pre-emption rule is not applicable and employees are not bound by a grievance procedure or arbitration where they are seeking to enforce statutorily granted rights. *Barrentine v. Arkansas-Best*

Freight System, 450 U.S. 728, 67 L.Ed. 2d 641, 101 S.Ct. 1437 (1981); *Amaro v. Continental Can Company,* 724 F.2d 747 (9 Cir. 1984); *Barrowclough v. Kidder, Peabody and Company, Inc.,* 752 F.2d 923 (3 Cir. 1985); *McLendon v. Continental Group, Inc.,* 602 F.Supp. 1492 (D.N.J. 1985) and *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367 (9 Cir. 1984).

Other cases hold that in a situation such as this where the former union members no longer have a bargaining unit and no longer have a supervisor they are not bound by the grievance procedure. *Anderson v. Alpha Portland Industries, Inc.,* 752 F.2d 1293 (8 Cir. 1985) and *Schneider Moving & Storage Company v. Robbins,* 104 S.Ct. 1844 (1984).

Further, the grievance procedure is designed to settle work place disputes, not financial disputes for the actual collection of wages due.

3. This action is not a suit under Section 301 of the Labor Management Relations Act nor is it a "hybrid" action.

The present lawsuit is one brought under specific provisions of Louisiana law and is not an action by a union against the employer nor is it a "hybrid" action by the employees against the union and employer. Therefore, the rules for suits under Section 301 of the Labor Management Relations Act and "hybrid" suits are not applicable.

4. The majority rule under federal law is that Respondents are entitled to collect their vacation pay.

Among the federal courts, the majority rule is that in this situation, where the employee is discharged through no fault of his own after having qualified for vacation pay except for being employed on a certain date, the employee is entitled to collect his vacation pay. *Local 186, United Packinghouse Workers v. Armour and Company,* 446 F.2d 610 (6 Cir. 1971); *Schneider v. Electric Auto-Lite Company,* 456 Fed.2d 366 (6 Cir. 1972). The same rule obtains under Louisiana law. Louisiana Civil Code Article 1771; *Morse v. J. Ray McDermott and Company, Inc.,* 344 So.2d 1353 (S.Ct. 1977).

Therefore, under both state and federal law Respondents in this case were properly awarded their vacation pay.

ARGUMENT

I.

PETITIONER FAILED TO ATTACK THE CONSTITUTIONALITY OF THE LOUISIANA STATUTE UPON WHICH THIS ACTION WAS BROUGHT IN THE LOWER COURTS AND THEREFORE THIS HONORABLE COURT SHOULD NOT CONSIDER THAT ISSUE.

This action was brought in the Fourth Judicial District Court for the Parish of Ouachita, State of Louisiana, under the provisions of a Louisiana statute, that being *Louisiana Revised Statute* 23:631 *et seq.*, which statute is set out verbatim in the appendix hereto. In their suit Respondents sought recovery of vacation pay, penalties and attorney fees. Respondents were awarded their vacation pay and attorney fees but no penalties.

As can be seen from a reading of the plain provisions of *Louisiana Revised Statute* 23:640, the statute grants a cause of action for collection of vacation pay under collective bargaining agreements and the statute denominates said vacation pay as "wages" within the meaning of the statute. The fact that Respondents were proceeding under the terrms of said statute is made abundantly clear in Paragraph 8 of their original petition.

Despite this, Petitioner, MANVILLE FOREST PRODUCTS CORPORATION, did not challenge the constitutionality of this Louisiana statute in the Trial Court by

appropriate pleading directed to that issue. Petitioner did argue that Federal labor law was applicable but never filed a specific pleading attacking the constitutionality of *Louisiana Revised Statute* 23:640. In Louisiana, the unconstitutionality of a statute must be specially pleaded in the trial court, and the grounds particularized. *Castille v. Evangeline Parish School Board,* 304 So.2d 701 (3 Cir. 1974).

In order for this Honorable Court to grant any relief to Petitioner, even if it agreed with Petitioner's position, it would have to declare *Louisiana Revised Statute* 23:640 unconstitutional, null and void as violative of the Supremacy Clause of the United States Constitution. Although Petitioner did argue in the Lower Courts that federal law applied, it did not raise its argument to the level of a constitutional challenge. In view of this, this Honorable Court has no jurisdiction to declare this statute unconstitutional and therefore has no means to grant relief to Petitioner even if Petitioner were correct, which is denied.

II.

THE DECISION OF THE LOUISIANA COURT IN THIS MATTER DOES NOT CONFLICT WITH FEDERAL PRE-EMPTION OF LABOR DISPUTES.

In its petition for a Writ of Certiorari Petitioner has conveniently left out a line of federal cases which provides an exception to the general law on pre-emption of labor disputes, particularly with regard to Petitioner's argument

that Respondents are limited to the grievance procedure and arbitration set forth in the collective bargaining agreement. That line of cases holds that the employees are not bound by a grievance procedure or arbitration and do not have to exhaust the same where their rights are based on a statute. In *Barrentine v. Arkansas Best-Freight System*, 450 U.S. 728, 67 L.Ed. 2d 641, 101 S.Ct. 1437 (1981), the unionized employees actually went through a grievance procedure claiming that they were entitled to be paid for certain time worked by them under the terms of the collective bargaining agreement and the Fair Labor Standards Act. They lost the arbitration claim and the arbitration was supposed to be binding. The United States Supreme Court reversed the decisions of the lower courts that the Plaintiffs were bound by the arbitration. This Court held that since the claim was based upon the Fair Labor Standards Act, a statute, the employees were not bound by the grievance procedure. The Court stated, at 101 S.Ct. 1443:

> "We reject this argument. Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."

The Court noted that the grievance process was not

sufficient to support the strong public interest in the employee being paid his wages. The same can be said of the present case. As was recognized by the Second Circuit Court of Appeal, the State of Louisiana has determined through this statute under which this suit was brought that it is a matter of strong public policy that persons be allowed to enforce their rights to collect their wages, including vacation wages, in the courts of this state even if those wages derive from a collective bargaining agreement. It is a matter of strong public policy not only in this state but nationwide that laborers collect their wages.

The lower Federal Courts have applied the rule that employees seeking to enforce statutory rights are not bound by the grievance procedure in many different contexts. It has been held that claims under the Employment Retirement Income Security Act were not subject to the exhaustion of a grievance procedure rule. See *Amaro v. Continental Can Company*, 724 F.2d 747 (9 Cir. 1984); *Barrowclough v. Kidder, Peabody and Co., Inc.*, 752 F.2d F.2d 923 (3 Cir. 1985).

In the case of *McLendon v. Continental Group, Inc.*, 602 F.Supp. 1492 (D.N.J. 1985), the Court made the very same holding in the context of ERISA claims and RICO claims and in its opinion the Court listed many cases recognizing and applying this principle under several different types of statutory claims.

In another similar situation, the Court in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9 Cir. 1984) recognized that a Plaintiff who brought a state court claim for wrongful termination was not bound by the grievance

procedure and additionally held that the claim was not preempted by federal law.

Another point in the present matter is that these Respondents were no longer considered employees and were no longer considered union members. They no longer had a bargaining unit to which they belonged and they no longer had a foreman or supervisor because the plant was shut down. Therefore, the express language of the grievance procedure does not even apply to them. This type of position was recognized as excepting the Plaintiffs from the provision of the grievance procedure in the case of *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8 Cir. 1985) and *Schneider Moving and Storage Company v. Robbins*, 104 S.Ct. 1844 (1984).

Finally, the grievance procedure is designed to settle work place disputes, not financial disputes with the employer. It is respectfully submitted that in none of the federal Statutes has Congress indicated its intent to take on all wage collection disputes. The matter of whether or not wages due have been paid has traditionally been a state concern, not a federal one. If Petitioner's position is correct, then workers would have to depend upon a vote of the union in order to collect wages earned. That is a ridiculous contention. Yet this is exactly what the Petitioner in this case is proposing.

III.

THIS ACTION IS NOT A SUIT UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT NOR IS IT A "HYBRID" ACTION.

It is respectfully submitted that Petitioner is totally wrong that this is a suit under Section 301 of the Labor Management Relations Act or a "hybrid" such as that found in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 76 L.Ed. 2d 476, 103 S.Ct. 2281 (1983). In that case, this Honorable Court did not in any way limit the doctrine of the statutory right exception discussed hereinabove and its decision was limited to actions under the Labor Management Relations Act and "hybrid" actions. The present suit is based upon *Louisiana Revised Statute* 23:631-640. This is not a "hybrid" action against the union and the employer. This is a totally different lawsuit under a state statute designed to protect parties who have earned wages and have not been paid. The Court in *Del Costello* held that a six (6) month limitations period would be applied to suits under the Labor Management Relations Act because there was no close analogy in ordinary state law for the type of action involved. Here, there is specific law in Louisiana setting forth the limitation of time available to claim wages due but not paid. Article 3494 of the Louisiana Civil Code provides for a three (3) year prescriptive period for such suits.

Even if the six (6) month rule somehow applied to the present case, the suit was still timely filed in February, 1982, because the vacation wages were not payable until

January 1, 1982, under the terms of the collective bargaining agreement.

IV.

THE MAJORITY RULE UNDER FEDERAL LAW IS THAT RESPONDENTS ARE ENTITLED TO COLLECT THEIR VACATION PAY.

On the merits of the vacation pay issue, the federal law is clear that Respondents are entitled to their vacation pay. All of the Respondents had completed 1040 hours of work and were eligible for the vacation pay except that they were not employed on January 1, 1982, due to the fact that they were unilaterally permanently laid off by Petitioner in August, 1981. Under Louisiana law, a condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment. Louisiana Civil Code Article 1771; *Morse v. J. Ray McDermott and Co., Inc.*, 344 So.2d 1353 (S.Ct. 1977).

Furthermore, express Louisiana law prohibits a contract forfeiting wages, which term would include vacation pay, and the Second Circuit Court of Appeal held that this provision of *Louisiana Revised Statute* 23:634 likewise applied in this situation.

Finally, the weight of federal law is on the side of Respondents in this situation. In the case of *Local 186, United Packinghouse Workers v. Armour and Company,* 446 F.2d 610 (6 Cir. 1971) the same issue was involved. In fact, the situation was remarkably similar to the present case. In

that case, the contract provided for continuous service as of January 1 and eligibility for vacation provided that the worker had worked a minimum of 150 days during the preceeding calendar year. The company closed the plant in September and refused to pay the vacation pay to those workers who had worked 150 days. The Sixth Circuit Court of Appeal reversed the District Court and granted vacation pay to the workers. The Court stated, at 446 Fed.2d 613:

> "When situations such as these have arisen in the past, they have almost uniformly been resolved in the unions favor."

The Court went on to elaborate on that statement with citations and analysis of cases. It is interesting to note that the Court's decision was based upon general contract law which provided that the occurrence of the event is eliminated as a condition if it prevented by the fault of the promissor. This is very similar to the Louisiana Civil Code Article cited earlier herein. See also *Schneider v. Electric Auto-Lite Company,* 456 Fed.2d 366 (6 Cir. 1972). In that case, the Court again recognized that the weight of federal law is on the side of the employee in this situation. It awarded vacation pay in a similar circumstance. It also held that the grievance procedure was not applicable.

Thus both the weight of federal law and state law is on the side of Respondents in this case.

CONCLUSION

In conclusion, it is respectfully submitted that the Petition for Writ of Certiorari filed by Petitioner, MANVILLE FOREST PRODUCTS CORPORATION, should be denied. The supposed errors in the decisions of the lower courts are unsupported and in fact the correct decision was made, regardless of whether state law or federal law is applied.

Respectfully submitted,

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BY: _____
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DATED: December _____, 1987.

CERTIFICATE OF SERVICE BY MAIL

I, C. Daniel Street, a member of the bar of the Supreme Court of the United States and Counsel of Record for Respondents herein, hereby certify that on December _____, 1987, pursuant to this Court's Rules, I served three (3) copies of the foregoing brief on the other party to this suit, Manville Forest Products Corporation, by depositing such copies in the United States Post Office, Monroe, Louisiana, with first class postage prepaid, properly addressed to Mr. C. A. Martin, III, Shotwell, Brown & Sperry, P.O. Box 1591, Monroe, Louisiana 71201.

All parties required to be served have been served.

_____

C. DANIEL STREET

DATED: December _____, 1987.

APPENDIX

LOUISIANA REVISED STATUTE 23:631-640

§ 631. Discharge or resignation of employees; payment within three days after termination of employment

A. Upon the discharge or resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, not later than three days following the date of discharge or resignation. Said payment shall be made at the place and in the manner which has been customary during the employment, except that payment may be made via United States mail to the laborer or other employee, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the event payment is made by mail the employer shall be deemed to have made such payment when it is mailed. The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section.

C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the

three day period provided for in Subsection A of this Section.

Amended by Acts 1977, No. 317, § 1.

§ 632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

Amended by Acts 1964, No. 422, § 1; Acts 1977, No. 317, § 1.

§ 633. Payment twice monthly in certain occupations; penalty for violations

Every person, engaged in manufacturing of any kind, or engaged in boring for oil and in mining operations, employing as many as ten or more employees, and every public service corporation, shall be required to make full payment

to employees for services performed as often as once every two weeks or twice during each calendar month, which pay days shall be two weeks apart as near as is practicable, and such payment or settlement shall include all amounts due for labor or services performed up to not more than ten days previous to the time of payment, except that public service corporations shall not be required to make payment for labor or services performed up to more than fifteen days prior to the time of payment, provided that, except in cases of public service corporations, this Section shall not apply to the clerical force or to salesmen.

Whoever violates the provisions of this Section shall be fined not less than twenty-five dollars nor more than two hundred and fifth dollars, or imprisoned for not less than ten days, or both, for each offense and for each day's violation.

Amended by Acts 1954, No. 150, § 1.

§ 634. Contract forfeiting wages on discharge unlawful

No person, acting either for himself or as agent or otherwise, shall require any of his employees to sign contracts by which the employees shall forfeit their wages if discharged before the contract is completed or if the employees resign their employment before the contract is completed; but in all such cases the employees shall be entitled to the wages actually earned up to the time of their discharge or resignation.

§ 635. Assessment of fines against employees unlawful; exceptions

No person, acting either for himself or as agent or otherwise, shall assess any fines against his employees or deduct any sum as fines from their wages. This section shall not apply in cases where the employees wilfully or negligently damage goods or works, or in cases where the employees wilfully or negligently damage or break the property of the employer, but in such cases the fines shall not exceed the actual damage done.

§ 636. Penalty for violations

Whoever violates the provisions of R.S. 23:634 or R.S. 23:635, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned for not less than thirty days nor more than three months.

§ 637. Non-resident plantation owners; suits against for wages, etc.; venue; service of citation

Mechanics, laborers and others doing work on plantations of non-resident proprietors may institute suit for recovery of their wages, labor, work or portion of the crop, as the case may be, against the non-resident proprietors of the plantations in the parish in which the labor or work was done and performed.

In all such cases it shall only be necessary to make service of the copy of citation and petition upon the agent, overseer, manager or other person having the control,

management, or administration of the plantation, and in the employ of the non-resident proprietor.

§ 638. Payment under retirement or other benefit plans; discharge of insurer, trustee or employee

A. Whenever payment or refund is made to any employee, former employee or his beneficiary or estate pursuant to a written retirement, death or other employee benefit plan or savings plan, such payment or refund shall fully discharge the employer and any trustee or insurance company making such payment or refund for all adverse claims thereto and from all liability for inheritance taxes due the state, unless, before such payment or refund is made, the employer or former employer, where the payment is made by the employer or former employer, has received at its principal place of business within this state, written notice by or on behalf of some other person that such other person claims to be entitled to such payment or refund or some part thereof or where a trustee or insurance company is making the payment, such notice has been delivered by the employer to the home office of such trustee or such insurance company or has otherwise been received by said parties. In the event the employee is deceased and a judgment of possession has been entered in his or her succession, payment of such money, or portions thereof, pursuant to the terms of the judgment of possession shall likewise fully protect the employer and any trustee or insurance company making such payment unless before such payment is made written notice of an adverse claim is received as provided herein.

B. Nothing contained in this Section shall affect any claim or right or inheritance tax to or on any such payment or refund or part thereof as between all pesons other than the employer and the trustee or insurance company making such payment or refund.

Added by Acts 1954, No. 367, § § 1, 2. Amended by Acts 1960, No. 58, § 1; Acts 1966, No. 274, § 1.

§ 639. Venue in suits for past wages

In addition to all other locations and courts in which such suit may be appropriate, workmen, laborers, clerks, and all other employees may sue their employers or hirers for any wages or salary due and owing in the district court of the parish where the work was performed.

Added by Acts 1960, No. 348, § 1.

§ 640. Fringe benefits payable under collective bargaining agreements

Any and all amounts payable by employers under collective bargaining agreements with any labor organization for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, or any other fringe benefits considered as wages by the secretary of labor in determining prevailing wage rates shall be considered and treated as wages due by employers under R.S. 23:631 - 23:639 and employers shall be obligated to pay the said amounts to the trust funds, trustees, or other obligees to whom such payments shall be due and owing in the same manner and subject to the same penalties for

nonpayment and the same provisions as to collection and enforcement by the said obligees as apply to ordinary wages under R.S. 23:631 - 23:639.

Added by Acts 1966, No. 536, § 1.